IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Patashi & Ors. V/S Ramgopal

S.B.CIVIL SECOND APPEAL No. 50 of 2007

Date of Judgment : 05 October, 2007

PRESENT
HON'BLE SHRI N.P.GUPTA,J.

Mr. L.R. Calla, for the appellant.
Mr. K.C. Samdariya, for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

Perused the impugned judgments, and the records of the two learned courts below.

The learned courts below have decreed the plaintiff's suit for mandatory injunction, directing the defendant, to remove the construction raised on the portion "C I J K" marked by red ink in the site plan Ex.-1 within two months, failing which the plaintiff will be entitled to have it removed through the Court.

Assailing the impugned judgments & decrees it has been contended, that the plaintiff has relied upon a decree passed on compromise, in the year 1986, (Sic. 87) but then the plaintiff did not disclose the fact of his having filed the earlier suit in the year 1982, and such non disclosure clearly amounts to fraud on the part of the plaintiff, and thus since the decree has been obtained by fraud, in view of the judgment of Hon'ble the Supreme Court in S.P. Chengalvaraya Naidu (dead) by LRs Vs. Jagannath (dead) by LRs & Ors., reported in JT 1993(6) SC-331, the same is liable to be set aside. Then, it is contended that the map Ex.-1 is not an authentic map, but is only a Nazari Naksha, which could not be decisive about the extent of construction to be removed, and the evidence led on behalf of the plaintiff, de-hors the map, does not establish any encroachment, but this aspect has not been considered by the learned courts below, which vitiates the impugned judgments. The other submission made is, that the land is a government land, and since it does not belong to the plaintiff, no decree of mandatory injunction, for removal of construction, could be granted, in favour of the plaintiff, directing removal of construction from such government land. Then, it was also contended, that no declaration has been sought by the plaintiff, about his title on the land in question, and in absence of such relief, decree for mandatory injunction could not be granted. Then, it is contended that the suit filed in the

year 1984, by the plaintiff, was filed against the municipality only, in which the appellant was not a party, and therefore, the findings recorded therein could not be used against the appellant. Thus, it was prayed that the decree may be set aside.

Learned counsel for the respondent, on the other hand, submitted that the decree has rightly been passed, more so in the compromise dt. 10.3.87 arrived in the suit of 1986, wherein it was agreed, that the land shown in the plan Ex.7A, marked by figure “A E H”, was agreed to be kept common, and open, and since the construction impugned has been raised in the portion towards the west of “A E”, the decree is perfectly correct.

I have considered the submissions.

Of course, there is no mention in the present suit, about the plaintiff having filed earlier suit, in the year 1982. However, copy of that plaint is available on record as Ex.A-1, and a look thereat shows, that cause of action in that suit was entirely different, inasmuch as, in the site plan submitted in that suit, which is available on record of the present suit at page C-9/3, being the certified copy, shows, that the dispute in that case was, that the present plaintiff apprehended the defendant to be opening a gate in the southern part, while according to the

plaintiff the defendant already has a gate at a distance of 30 ft. away from the place shown in present Ex.-1 at point "C", and it was apprehended, that thereby the open Chowk, claimed to be in use of plaintiff, would be obstructed, and dispute could arise, and in that sequence, averments were made, that the plaintiff has encroached upon the land to the extent of 4ft. in width, and 30 ft. in length, and that, by constructing wall "A to B", therein he is opening a gate. A combined reading of the map, filed in the suit of 46/82, available at page C 9/3, and Ex.1 of the present suit, so also Ex.3 in the present suit, and Ex.7A, being yet another map, which was filed by the present appellant himself, in the suit of 1986, if looked together, make it clear, that the wall "A to B" in the suit of 1982, is not the wall "J to K" shown in Ex.1 in the present suit, but is the wall "I to C", as shown in Ex.1 in the present suit. That being the position, it cannot be said, that any fraud has been played by the plaintiff, in not disclosing the fact of his having filed the suit in the year 1982, in the present suit, and the impugned decrees cannot be decried on that count.

Then, so far as the maps being not authentic, and being only Nazari Naksha, is concerned, a look at the map Ex.-1 and Ex. 3, so also the map available at C9/3, do show, that of course they are not shown to be on scale, but then, a look at Ex. 1 and Ex.3 does show, that therein, the

measurements of the properties are given, and in all the maps Ex.1 and Ex.3, the plaintiff's property has been shown to be measuring 59'.6". towards the south side, and 50 ft. towards the north. In this background, it is significant to note, that the defendant appellant Beg Raj @ Bega Ram, while in the witness box as D.W.1, has clearly admitted, that his western wall, and the eastern wall of the plaintiff, were straight through and through north to south, and he has also admitted, that he had constructed the suit shop anew in March, 1994. Likewise a look at the statement of plaintiff as P.W.3 also shows, that even according to him, his eastern wall and defendant's western wall is straight, through and through north to south. Ex. 7-A is the site plan produced by the appellant, in the suit filed by him in the year 1986. Significantly that suit, filed in the year 1986, was a suit for cancellation of the decree, passed in the suit of 1984, which suit of the year 1984 was filed by the present plaintiff against the municipality only, and without impleading the defendant, and in this site plan Ex. 7-A also, the western wall of the defendant and eastern wall of the plaintiff has been shown to be straight, through and through north to south. Thus, the parties, all through, are ad idem about the wall being straight through and through north to south, while if the offending construction upto "J to K" in Ex.1 were not offending one, and formed part of the defendant's property, obviously wall "I to B" in Ex 1, or "B to G" in Ex 3, or "A

to D" in Ex. 7A, would not have been straight. Of course, the plaintiff was confronted with the recitals in the suit of 1982, and he has admitted the recitals, but then, those recitals do not make out, that the wall "J to K" had been constructed in the year 1982, nor it has been so suggested to the plaintiff. In such circumstances, this contention does not hold good, and it cannot be said, that de hors the map the evidence does not establish any encroachment.

Then, so far as the contention about permissibility of grant of mandatory injunction is concerned, of course, the land is not claimed by the plaintiff to be his own, but then, the plaintiff had filed the suit in the year 1984 against the Municipality, for being sold portion of the land, wherein decree was passed against the Municipality, restraining it from interfering with the plaintiff's possession, and using, and the suit of the year 1986 was filed, by the present defendant, precisely for cancellation of that decree, by impleading the present plaintiff, and the Municipality, as the defendants, copy of this suit is available on record as Ex. 6A, and in that suit, the site plan was produced by the present appellant, certified copy whereof is available on record as Ex 7A, and it is in this suit, that a compromise was entered into between the parties, certified copy whereof is Ex.8A, wherein it was agreed, that the portion "A E H" marked in the plaintiffs map, (plaintiff being the

present appellant and defendant in the present suit), will remain joint between the present parties, and neither of the parties would be able to raise any construction, in any manner, on any part of this Chowk, and it will be free to be used, according to the respective convenience, on the occasion of marriage or death etc., and the suit against the Municipality was withdrawn. Obviously thus, this decree being Ex. 10, was obtained by the present appellant, against the present plaintiff, and therein, the present appellant had himself undertaken, not to raise any construction. In such circumstances, if the plaintiff therein himself violates the solemn undertaking given in the Court, or solemn compromise, the appellant cannot be allowed to say, or contend, that mandatory injunction cannot be granted.

So far the contention about the absence of relief of declaration is concerned, looking to the nature of controversy, when vide Ex.10, read with Ex.8A, parties had agreed, that the land shall remain common, for being used by the parties, and neither of the parties will raise construction thereon, no declaration was required.

So far as the contention about using the findings recorded in suit filed against the Municipality in the year 1984, is concerned, in view of above discussion, this contention also does not hold good.

The net result of the aforesaid discussion is, that I do not find the appeal to be involving any substantial question of law, and the same is, therefore, dismissed summarily.

(N.P.GUPTA), J.